EMPLOYMENT TRIBUNALS

Claimant: **Mrs D Murray**

Respondent: **Harbourside Marina Limited**

JUDGMENT

The claimant's application dated 12 March 2018 for reconsideration of the judgment sent to the parties on 21 February 2018 and Reasons sent to the parties on 28 February 2018 is refused.

REASONS

The reconsideration is refused because there is no reasonable prospect of the original decision being varied or revoked. The reasons for this decision are set out below.

The Claimant's request for reconsideration

1. The Claimant's request for reconsideration is based on the submission that the Tribunal has "*erroneously interpreted the bonus clause*" in paragraph 3 of the Respondent's letter to the claimant of 14 November 2016. The Claimant's representative asks that the Tribunal reconsider its decision on three points, which concern firstly, the intentions of the parties in relation to sharing profits of the Respondent's bar and restaurant business, secondly the application of the "contra proferentem" rule and thirdly the Claimant's status as a litigant in person.

i) The intentions of the parties

2. The Tribunal made a finding of fact in relation to the meaning of the phrase "net trading profit" in the Claimant's contract of employment. In summary, the Tribunal found in paragraph 8 of the judgment that this phrase was effectively nonsensical, in that the phrase conflates two inherently contradictory concepts, those of "net profit" and "trading profit/gross profit". No evidence has been presented to the Tribunal as part of the reconsideration request that was not able to be presented to the Tribunal at the time of the Hearing, or at all, that would have reasonable prospects of allowing the Tribunal to conclude that the parties

had a clear mutual understanding of the meaning of the phrase.

3. Paragraph 3 of the request for reconsideration states "..the Claimant produced a business plan to which the Respondent was evidently receptive given that certain features were implemented notwithstanding misgivings subsequently articulated in evidence". However, Mr Beard told the Tribunal in evidence that he was nervous about going into partnership with the Claimant as she couldn't provide business plans or cash flow figures. This is reflected in paragraph 12 of the judgment and reasons.

4. The claimant's representative submits, at paragraph 4:

> *"in construing the true meaning of the phrase "trading net profit", the Tribunal should have regard to what would have occurred had that original proposal come to fruition. The distribution of profits should therefore be treated as though the parties were properly involved in partnership irrespective of how their relationship subsequently evolved. In such a scenario, it would not have been possible for the Respondent to arbitrarily assign overheads such as "bar depreciation" and "professional fees" to a separate business. The profits distributable by way of bonus would have been the trading profits labelled as "Bar Gross Profits" in the draft accounts supplied by the Respondent".*

5. In support of this, the Claimant's representative has supplied a letter from the Claimant's accountant dated 27 February 2018 which states that it is his view that the parties envisaged a split of the "trading profit" i.e. the gross profit. In it, he describes having had two conversations with the Claimant about the allocation of overheads but does not provide any detail as to what was discussed or what the Claimant discussed with the Respondent at the time. The evidence contained in this letter could have been before the Tribunal at the hearing, as could detailed evidence of the Claimant's recollection of her pre-contractual discussions with the Respondent, but it was not.

6. The Claimant's representative's paragraph above raises several issues. Firstly, as a matter of partnership law, where parties operate a business together in partnership, all profits and losses of the business are shared equally, unless the parties agree to the contrary. The Tribunal was not presented with any evidence to the contrary at the Hearing. This was the finding of the original judgment and reasons at paragraphs 11-13 and 43-44. The Claimant's "business plan" was not before the Tribunal during the hearing and has not been supplied by the Claimant on reconsideration. As set out above, the Respondent's evidence, which the Claimant did not challenge, was that the Claimant did not produce a proper business plan.

7. Secondly, the Claimant's representative states that the Respondent should not have been able to "*arbitrarily assign overheads*" to the bar and restaurant business. The evidence before the Tribunal was not that the Respondent had done so, but that the business itself was not a sound investment and was not likely to make a profit, and had not done so to date (paragraphs 13-18 of the Reasons) for a variety of reasons and that furthermore, the Claimant had not had any discussions with the Respondent about the financial condition of the business before accepting the offer, or the existing overheads the business had, as was recorded in paragraphs 13-20.

8. The Claimant was asked a series of questions by the Tribunal when giving her evidence under oath. Paragraph 5 of the Reasons records that the Claimant understood that the profit share was based on a "partnership" model. Paragraphs 11, 12 and 13 record that the Claimant originally thought that she was taking on the role in partnership with the Respondent as a separate business, and would therefore be entitled to "*whatever profit was left over after all overheads had been taken out*" and that this did not change even when their relationship developed into one of employer and employee – the terms of the profit share was still the same even though the Claimant became entitled to a basic salary in addition.

9. Although the parties agreed that the bar and restaurant would be run by the Claimant as a separate business, the parties knew that the reality of the arrangement was that it was part of the Respondent's larger operation. Paragraphs 14 and 17 record that the Claimant did not establish what the parameters of the restaurant and bar operation were and what the financial condition of the business was before taking over.

10. The Claimant told the Tribunal that she visited the bar several times as a customer prior to taking over as manager and that she saw that it had been neglected. Paragraph 15 records the Respondent's evidence that the bar had been neglected. This was not challenged or disputed by the Claimant at the hearing. However, the Claimant told the Tribunal that she did not request to see the accounts of the bar and restaurant business, or the Respondent's overall business, at any point either prior to or during her relationship with them.

11. Paragraph 17 records in some detail the lack of enquiries by the Claimant and the Tribunal's findings as to the assumptions made by the Claimant when she took over as manager. During the Hearing itself, in answer to directed questions from the Tribunal to elucidate the Claimant's evidence in the absence of a full written statement, her evidence as to which overheads should and should not be deducted was not clear. She accepted that some overheads would have to be deducted, but was not able to say exactly which ones would be included and which would be excluded. She assumed, for example, that "bar cooling repairs" should not have been overheads of the bar because she assumed that a brewery would be responsible for this, as it might have been in a "tied" pub, until Mr Wilkes explained that their bar had a different relationship with the brewery as it was not a "tied" establishment. The Claimant was asked in directed questions from the Tribunal, if she had established what sales figures to expect and what takings the bar had, but she told the Tribunal that she did not know what the bar took and she did not ask. This is recorded in paragraph 13, 14 and 17 of the judgment and reasons.

12. The Claimant's accountant in his most recent letter indicates that the Claimant sought advice from him on several occasions prior to accepting the terms of the Respondent's offer. However, the Claimant's evidence, when asked by the Tribunal, was that she showed the offer letter to her bank manager, who gave her opinion that it was a "good contract", and that she had relied on this as due diligence. The Claimant provided no evidence of detailed discussions with her accountant during the Hearing and none have been provided subsequently.

ii). Application of the "contra proferentem" rule

13. The claimant's solicitor asks that the *contra proferentem* rule be applied to

construe the ambiguous meaning of the contract against the respondent. The *contra proferentem* rule should only be applied in the event that the issue cannot be otherwise resolved by the application of ordinary principles of construction of contracts. That is not necessary in this case.

iii). The Claimant's status as a litigant in person

14. Although the Claimant now asserts through her solicitor that she "found the process stressful and intimidating", every effort was made during the Hearing to understand her evidence, including in relation to her other claims. This was done through a series of directed questions and through clarification of the process to be followed during the Hearing. It became apparent during the Hearing that the Claimant had not fully turned her mind to the issue of what evidence would assist the Tribunal in relation to determining her complaint relating to the profit share. She had brought evidence relating to unpaid overtime and unpaid wages, but not in relation to the profit share, which was the largest in value of her complaints. She was also given assistance in questioning the respondent's witnesses and was given opportunities to ask questions of the Tribunal in the event that matters were unclear.

General principles on reconsideration

15. A request for reconsideration is properly to be considered by the Tribunal in two stages, as per Rule 72 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1. The application was made by the Claimant's representative in accordance with Rule 71, and must therefore be considered initially by an Employment Judge under Rule 72(1). If it is considered that there is no reasonable prospect of the original decision being varied or revoked, the application shall be refused.

16. Reconsiderations are granted where, as per Rule 70, it is in the interests of justice to do so. Reconsideration is not an opportunity to allow the parties to re-present evidence that was available at the time of the hearing and that the parties could have presented for consideration by the Tribunal at that time but did not. It is also not to be used as a second opportunity to argue a party's case. Reconsiderations granted in the "interests of justice" must be in the interests of justice of both parties and not just the party making the application. Errors of law are properly addressed by appeal to the Employment Appeal Tribunal.

The Claimant's application for reconsideration refused

17. Where contract terms are unclear and uncertain, as is the case in the claimant's contract of employment (the "offer letter"), it is not an error of law to allow an assessment of the background circumstances of the formation of the contract to feature in an analysis of the interpretation of express contractual terms. Interpretation is the "*ascertainment of the meaning which the document would convey to a reasonable person having all the knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contrac*t" (***Investors Compensation Scheme Ltd v West Bromwich Building Society*** [1998] 1 All ER 98 at 114.)

18. Therefore, to construe the terms of the contract, given the inherently contradictory term "trading net profit", the Tribunal needed to look elsewhere for evidence. The circumstances of the formation of the contract were that the

parties had previously agreed to operate as a partnership. The "reasonable person" would take from this, in the absence of contrary evidence, that the parties had agreed to share all profits and losses equally. Such persuasive evidence to the contrary was not available at the Hearing and has not been presented by the Claimant on reconsideration.

19. Although the Claimant's solicitor states in paragraph 4 of the reconsideration request that if the parties were "properly in partnership" it would have not been possible for the Respondent to arbitrarily assign overheads such as "bar depreciation" and "professional fees" to the business, in fact the structure of the business, had the parties been establishing a partnership, would have been a matter for the parties to discuss along with overheads, debts, staffing and accounting as part of their pre-contract negotiations. According to the evidence that was before the Tribunal, none of this was discussed. The Claimant's accountant's letter of February 2018 refers to some pre-contract discussions between the Claimant and the Respondent, but provides no detail.

20. Instead, the Claimant appeared to make assumptions about the terms of her relationship with the Respondent that turned out to be incorrect. This was to the Claimant's detriment but it was also her responsibility to find such matters out and she did not, either before or during her employment with the Respondent.

21. The "reasonable person" would not be able to assume from the situation at the time of the contract that the claimant in fact wished only a limited selection of the business overheads to be deducted from the trading figures.

22. The Claimant's application for reconsideration is refused on the grounds that there is no reasonable prospect of the original decision being varied as requested by her. It is also not in the interests of justice to do so. The Claimant is therefore not entitled to the gross profit of the Respondent's bar and restaurant business as requested.

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Employment Judge Barker

Date: 23 April 2018

JUDGMENT SENT TO THE PARTIES ON

24 April 2018

FOR THE TRIBUNAL OFFICE